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In the

Supreme Court of the United States

No. 71-6631

MARIE WELLS FLANAGAN,

Petitioner,

v.

UNITED STATES,

Respondent.

BRIEF FOR PETITIONER MARIE WELLS FLANAGAN

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable Judges of Said Court:

PRIOR OPINION

The only prior opinion is United States v. Flanagan, 5th Cir., 445 F. 2d 263. (See Appendix "A").

JURISDICTION

The judgment in the trial court was entered March 10, 1970, and the opinion in the United States Court of Appeals for the Fifth Circuit was decided on June 23, 1971.

A rehearing in that Court was overruled without written opinion on September 16, 1971. A Motion for Extension of Time to file a Petition for Writ of Certiorari was timely filed and granted by this Court on October 16, 1971.

The statutory jurisdiction of this Petition is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Is there any evidence to support the verdict of robbery of a bank by force, violence or intimidation?

II. Is the evidence of identification of Petitioner sufficient beyond a reasonable doubt?

III. Did the Trial Judge err in admitting testimony where photographs were shown to the witness which were suggestive?

IV. Was the verdict unauthorized and void because it is not for a lesser included offense?

STATEMENT OF THE CASE

The facts are very simple. As three bank employees were walking to the main bank building from a drive-in station apart from the bank, a car being driven by a woman pulled into the driveway; a man with a gun in his hand got out on the passenger side and told the employees to put the money down; the man picked the money up, got back into the car and the woman and the man with the money drove away. The entire event took about 15-20 seconds. The woman did not say anything or make any gesture.

Only one person identified Petitioner as the driver, after only a quick "side-view" glance, and that was Mrs. Doyal, who was subsequently shown a spread of front view photographs before later identifying Petitioner as a customer at the bank.

The money taken was insured by the Federal Deposit Insurance Corporation.

REASONS FOR GRANTING WRIT

I. There is absolutely no evidence to support the verdict against Petitioner for robbery of a bank by force, violence or intimidation. (Germane to Question No. I.)

II. The evidence of identification of Petitioner was not proved beyond a reasonable doubt. (Germane to Question No. II.)

III. The photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (Germane to Question No. III.)

IV. The verdict is unauthorized and void because it is not for a lesser included offense. (Germane to No. IV.)

ARGUMENT

I.

There is absolutely no evidence to support the verdict against Petitioner for robbery of a bank by force, violence or intimidation. (Germane to Question No. 1.)

There is a complete and total absence of any evidence to support the indictment and verdict of the jury.

Petitioner and Jack W. Flanagan were charged in a single count indictment with the offense of bank robbery, i.e., by force, violence and intimidation, they did take money from an employee, by the use of a hand gun.

The Court charged on the law of aiding and abetting and that it constituted each a principal.

A motion for acquittal was timely made and presented by Petitioner at the close of the government's case.

The jury found Jack W. Flanagan guilty as charged in the indictment, to-wit: robbery by the use of a gun.

The jury found Petitioner Marie Flanagan Not Guilty as charged in the indictment; however, the jury returned an unauthorized verdict[1] of robbery unaccompanied by an assault with a gun.

18 U.S.C. 2113 (a), upon which the Petitioner's sentence is based requires force, violence or intimidation on the part of the Petitioner.

It is undisputed that Petitioner did nothing except drive the car. If she is guilty of any crime, it is because she aided and abetted Jack W. Flanagan, who was found guilty of robbery of a bank by intimidation (no force or violence used) by the use of a gun. Petitioner was found Not Guilty of robbery of a bank by intimidation by the use of a gun. Therefore, the gun being the basis of the intimidation used,

[1] See Question IV. in this Petition.

and Petitioner having been found by the jury not guilty of the offense involving a gun, then there is absolutely no evidence of any force or violence or intimidation by Petitioner to support the verdict of the jury.

A "motion to direct an acquittal raised a question of law, and an exception to the denial of the motion is properly reviewable here." *France v. U. S.*, 164 U.S. 676, 17 S. Ct. 219, 221, 41 L. Ed. 595.

Where, as here, there is a claim that there is absolutely no evidence in the record to support the verdict, and a motion for acquittal has been overruled, a "question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict." *Abrams v. U. S.*, 250 U.S. 616, 40 S. Ct. 17, 18, 63 L. Ed. 1173, 1175. See also *Mortensen v. U. S.*, 322 U.S. 369, 64 S. Ct. 1037, 88 L. Ed. 1331.

Therefore, since the jury found by their verdict that Petitioner was not guilty of robbery of a bank by the use of a gun and there is no other evidence of any other force, violence or intimidation involving Petitioner, there is absolutely no evidence to support the verdict that Petitioner is guilty of robbery of a bank by force, violence or intimidation and this cause should be reversed and remanded to the trial court.

II.

The evidence of identification of Petitioner was not proved beyond a reasonable doubt. (Germane to Question No. II.)

The evidence of identification of Petitioner Marie Flanagan is insufficient to show beyond a reasonable doubt that she was the driver of the automobile.

Only one witness testified as to the identity of Petitioner Marie Flanagan. That witness, Mrs. Doyal, testified she only saw a quick side view glance of the driver's face and that she had never seen the driver before and the driver had on dark sunglasses and a scarf covering her head. Mrs. Doyal testified that she was standing near the right rear fender of the car and looked at the driver thrcugh the second window of the right hand side; that the driver was looking in the mirror as Mrs. Doyal was standing by the rear of the car; that the driver turned her head to the right and then the driver turned "back real quick after she noticed" Mrs. Doyal was looking at her; that the only facial features Mrs. Doyal observed was the driver's "nose" and it "looked like she had kind of a babydoll face, I will call it, a small face." Mrs. Doyal further testified that on the two subsequent times that she saw Petitioner Marie Flanagan prior to trial that the color of Petitioner Marie Flanagan's hair was different than the twig of hair she saw on the driver of the automobile used in the robbery. Mrs. Doyal further testified that she was excited on this occasion.

The Government conceded that the robbery took 15 or 20 seconds and during that very short period of time, as testi-

fied to by Mrs. Doyal, she saw the man get out of the car with the gun, saw him pick up the boxes, got a good look at him, from his shoes to his pants to his clothes to his facial features to his cigar to his glasses and his hat and caught this quick glimpse of the side view of the driver and looked at and memorized the license number on the back of the car.

So, in essence, the only specific identifying features of the driver contained in the record are (1) nose; (2) a babydoll or small face; (3) blonde hair; (4) twenty-five years of age, either over or under, and (5) shorter than five feet six inches.

As to the nose, it is common knowledge that all women have a nose. There was no testimony that the nose was big, small, crooked, flat, sharp, shiny, red, or any other specific identification to distinguish a nose seen by Mrs. Doyal from the nose of every other woman in the world.

As to the driver's face being babydoll or small, there was not any elaboration on what Mrs. Doyal meant by babydoll face. It was a conclusion or opinion on her part and did not identify any particular nor specific feature to distinguish it from the thousands and thousands of other women who might have what Mrs. Doyal or anyone else would describe as a babydoll face. As to having a small face, there was no further identification to expand upon what she meant by this conclusion. In general, approximately one-third of all of the women in the world would have a small face; one-third would have a medium-size

face and one-third would have a large face. There was no elaboration as to what she compared with in drawing the conclusion that the face was small, a relative word.

As to the blonde hair, there are hundreds of thousands of women in the world who have blonde hair and this is more true in today's society. She did distinguish between the driver's blonde hair and the blonde hair of Marie Flanagan when seen upon two subsequent occasions prior to trial. There was no testimony from any witness, including the relatives of Petitioner Marie Flanagan, that Marie Flanagan ever wore a wig or a hair-piece to change the color of her hair.

As to the age of the driver, Mrs. Doyal testified very generally that the driver was "twenty-five, she could be over or under." This general description as to age includes every woman in the world. Every woman is either twenty-five years of age or under twenty-five years of age or over twenty-five years of age.

As to the driver being shorter than five foot six inches, there was no specification as to how much shorter than five foot six inches and this would include millions of women.

In addition, in traditional identification cases, there are many other features and qualities of a person that can be described in identifying a particular person. In this case the following evidence is absent, among others.

There was no voice identification; there was no evidence as to the build of the driver; there was no evidence of the

figure of the driver; there was no evidence of the shape of the face; there was no evidence of the shape of the head; there was no evidence as to whether or not the driver was of light, medium or dark complexion; there was no evidence as to the features of the mouth; there was no evidence as to the presence of or absence of scars; or anything else that is relatively specific upon which a later identification, some two months later, could be made.

Proof that relies wholly upon identification made by eye-witnesses is inherently weak; persons who merely saw a thief or an attacker briefly, and under conditions of stress may — despite the best of intentions — too readily be mistaken. Kuh, *Careers in Prosecution Offices*, 14 J. Legal Ed. 175, 187, n21 (1961).

In Wall, *Eye-Witness Identification in Criminal Cases*, 1965, there are many good descriptions concerning the identification problem and below-quoted are some excerpts from this excellent book.

> "What are the causes of the erroneous identification which, either in their actuality or their possibility, so vex the administration of criminal justice? Basically, there are two causes: 1) The normal and universal fallibility of human sense perception and human memory, and 2) The susceptibility of human mind to suggestive influences." (pp. 8-9.)
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> * * * * *
>
> "In considering the effect which the use of photographs may have upon the reliability of an identification, there are a number of principles which must be recognized, and the first is that where a photograph has been identified as that of a guilty party, any subsequent corporeal identification of that person may be

based not upon witnesses recollection of the features of the guilty party, but upon his recollection of the photograph." (p. 68.)

* * * * *

"Another factor which has a substantial effect upon the reliability of an identification is the amount of time which elapsed between crime and identification. The point needs little amplification, since it is common knowledge that memory and sense impressions fade with the passage of time, and any belief that they become clearer or even remain the same as time passes is 'contrary to the natural order of things.'" (p. 127.)

In Cahn, *The Moral Decision*, pages 258-259, it was said:

"* * * an honest mistake of identification * * * can hang an innocent man despite the most meticulous and fair minded trial of his case."

In 57 J. Crim. L.C. and P.S. 376, Inbau, it was said:

"Of all the factors that account for the conviction of the innocent, the fallibility of eye-witness identification ranks at the top, far above any of the others." (See also *People v. Gardner*, 221 N.E. 2d 232, p. 236.

In *People v. Peck*, 193 N.E. 609, at 612, the Court said:

"In weighing the evidence of identification of one stranger by another, the attendant circumstances, together with the probability or improbability of affording an opportunity for a definite identification, must be considered and weighed, for after all, the identification of one person by another who has never seen him before is an opinion or conclusion of the identifying witness."

In *Reamer v. United States*, 6th Cir., 1956, 229 F. 2d 884, at 886, the Court, in reversing that case, said that:

"* * * the identification is uncorroborated by any other circumstance and is so pregnant with danger of honest

> mistake that it fails to qualify as dependable substantial proof that the appellant was one of the bank robbers. Neither logic nor experience persuades us to so hold."

In *Hendrix v. United States*, 5th Cir., 1964, 327 F. 2d 971, at 974, the Court said:

> "* * * there must be something more than the testimony of a resemblance and the fact that a person sought to be identified was accompanying the persons who are more clearly tied in with the offense charged."

In this case the conclusionary opinion of Mrs. Doyal that Petitioner Marie Flanagan was the driver of the automobile used in the robbery is based primarily upon her seeing both Petitioner and Jack W. Flanagan some two months after the robbery while they were together in the car at the same bank making a deposit.

Numerous witnesses testified that Marie Flanagan was at the Club either all or most of the time that Jack Flanagan was gone for the hamburgers. No one testified that she left the Club.

In support of the Government's case, there were numerous facts that they did *not* prove, either directly or circumstantially in support of their contention that Marie Flanagan participated in the manner as outlined in the Government's closing arguments to the Jury.

The Government did not prove that Marie Flanagan had ever driven a similar car either before or after the date of the robbery.

The Government did not prove that Marie Flanagan had any black slacks, either at the Club or elsewhere.

The Government did not prove that Marie Flanagan had a scarf similar to the one described by the teller.

The Government did not prove that Marie Flanagan owned or had a wig or hair-piece of the color Mrs. Doyal described being worn by the driver.

The Government did not prove that Marie Flanagan helped put makeup on Jack Flanagan's face at any time, either before or after the robbery.

The Government did not prove that Marie Flanagan ever wore a hair-piece of a different color than her natural hair at any time either before or after the robbery, even though the identifying witness said that the hair on the driver of the car was a different shade than Marie Flanagan's own hair.

The Government did not prove that Marie Flanagan came into any unusual sums of money or sudden wealth after the bank robbery.

The Government did not prove that Marie Flanagan could even drive a car.

The Government did not prove the age of Marie Flanagan as being within the range testified to by the woman teller, assuming she meant approximately twenty-five (25) years of age.

The Government did not prove the height of Marie Flanagan as being within the range as testified to by the woman teller.

As stated by this Court in *In Re Sawyer*, 360 U.S. 622, 635, 79 S. Ct. 1376, 1382, 3 L. Ed. 2d, 1473, "We can indulge in no involved speculation as to Petitioner's guilt by reason of the imagination of others."

This Court can determine if the issue of the identity of the Petitioner was proved beyond a reasonable doubt. *Christoffel v. U. S.*, 338 U.S. 84, 69 S. Ct. 1447, 93 L. Ed. 1826.

The trial court charged as follows:

> "A reasonable doubt means a doubt based upon reason and common sense and arising from the state of the evidence. It is such doubt as would cause a reasonable person to hesitate to act in the more important affairs of his own life."

See *Hopt v. People*, 120 U.S. 430, 73 S. Ct. 614, 30 L. Ed. 708.

The question then for this Court is whether a reasonable person would hesitate to act in the more important affairs of his own life based upon only the quick side view glance identification of Petitioner and the gross lack of other factors not supporting sufficient identification of Petitioner. The answer must be in the negative. Would a reasonable person risk ten (10) years of his own life upon such flimsy evidence? The answer is an emphatic "no, sir."

Therefore, the extremely slight evidence of identification and the lack of sufficient evidence of identification does not

meet the standard required to have proof *beyond* a reasonable doubt and the cause should be reversed and remanded to the trial court.

III.

The photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (Germane to Question No. III.)

The only evidence connecting Marie Flanagan with the robbery was the extremely limited and quick side view of one witness, Mrs. Doyal. The bank robbery occurred on September 22, 1969, and prior to Mrs. Doyal seeing Marie Flanagan on November 17, 1969, with Jack Flanagan, whom she had ample opportunity to observe at the time of the robbery, Mrs. Doyal had seen photographs of women and had picked out a picture of Marie Flanagan as the driver of the get-away car. There was no charge in reference to the bolstering of the identification by the photographs and there was not a hearing out of the presence of the jury by the Judge to determine if the picture spread was impermissibly suggestive either in the photographs used or the manner or number of times they were displayed. The evidence shows that pictures were shown to her by both the City Police, Captain Fritz, and the F.B.I., Mr. Kell.

Recently, this Court in *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), held that:

> "* * * convictions based upon eyewitness identification at trial following a pretrial identification by photograph

> **will be set aside * * * if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (390 U.S. at 384.)**

Further, as stated in *Simmons v. United States*, supra, at 390 U.S. 383, "This is a claim which must be evaluated in light of the totality of surrounding circumstances."

The "totality of surrounding circumstances" in Marie Flanagan's case are as follows: Mrs. Doyal had never seen the driver prior to the robbery; Mrs. Doyal only saw a quick side view of the driver, who was wearing dark sunglasses and a scarf covering her head; Mrs. Doyal was shown numerous photographs, one of which was a photograph of Marie Flanagan, whom she identified as having seen before, and some of these photographs were shown approximately a month after the robbery; that Marie Flanagan's husband had been advised by the police a few days after the robbery that he was a suspect in the robbery, (presumably communicated to Mrs. Doyal during the course of the investigation); that Marie Flanagan was identified by Mrs. Doyal approximately two (2) months after the robbery, while she was a passenger in a car, at the bank, being driven by Jack Flanagan, whom she had a good view of during the robbery and had identified from photographs previously shown by the police and F.B.I. and on such occasion, Marie Flanagan's hair was a different color than that of the driver. Further, the other person robbed failed to identify Marie Flanagan as the driver and there was no other evidence to show that Marie Flanagan was

the driver. Also, the very limited description of any facial features viewed by Mrs. Doyal, i.e., "nose" and "a small face" (see "The Evidence of Identification Is Insufficient" herein.) was not of sufficient detail to not be influenced by subsequent viewing of photographs.

Mrs. Doyal actually testified to conflicting statements and positions in regard to the photographs shown to her. At one point, Mrs. Doyal testified that she identified the photographs of both Petitioner and Jack W. Flanagan as the robbers. At another point, Mrs. Doyal testified that she had to see Jack Flanagan again before she could identify him, yet she was looking squarely at his face during the robbery.

So, it appears, from the entire record in general and Mrs. Doyal's testimony in particular, that Mrs. Doyal got a good view of the gunman (Jack Flanagan) and an extremely limited view of the driver (Petitioner); that Jack Flanagan was a prime suspect for the robbery by the police; that Mrs. Doyal was shown pictures of Jack Flanagan and his wife, Marie Flanagan subsequent to the robbery; that Mrs. Doyal saw Jack Flanagan approximately two (2) months later at the bank and identified him as the gunman and identified Marie Flanagan, who was with him, as the driver of the car.

With such extremely limited and quick side view of the driver's face by Mrs. Doyal, the "totality of surrounding circumstances" show that the "photographic identification procedure was so impermissibly suggestive as to give rise

to a very substantial likelihood of irreparable misidentification."

As was said in *U. S. v. Sutherland*, 5th Cir., 428 F. 2d 1152, at 1156, "if the witness caught only a fleeting glimpse of an unknown fleeing felon, the likelihood of misidentification is substantially increased by suggestive picture spread" is applicable to the facts here involving this Petitioner.

Therefore, because of the very substantial likelihood of irreparable misidentification of Marie Flanagan and because there was not an opportunity for the trial judge to make a determination concerning the photographic identification procedure as being impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification in connection with the fleeting glimpse by the teller of Marie Flanagan, the case should be reversed and remanded for a hearing or a new trial.

IV.

The verdict is unauthorized and void because it is not for a lesser included offense. (Germane to Question No. IV.)

Petitioner and Jack Flanagan were jointly indicted in a one count indictment for the offense of robbery of a bank under 18 U.S.C. Section 2113, (a), which was enhanced in that single count indictment under Section (d) of said act which only provides for an increased penalty, if in committing the robbery under Section (a) it was done by an assault or putting in jeopardy the lives of the persons robbed by the use of a dangerous weapon.

The Jury found Marie Flanagan "not guilty as charged in the indictment."

However, the Jury did return an additional verdict that Marie Flanagan was "guilty of the lesser included offense of robbery of a bank, unaccompanied by an assault, which is necessarily included in the crime of robbery of a bank, accompanied by an assault charged in the indictment."

When the Jury returned the verdict of "Not Guilty as charged in the indictment", then the Jury was not authorized, nor did the Court have the jurisdiction to find the Petitioner "Guilty of the lesser included offense of robbery of a bank, unaccompanied by an assault."

Rule 31c, Federal Rules of Criminal Procedure, states that:

> "The Defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

The question thus is whether or not 18 U.S.C. 2113, (a), is a necessarily included or lesser included offense of 18 U.S.C. 2113, (d).

If 18 U.S.C. 2113, (a), is not a lesser included offense of 18 U.S.C. 2113, (d), then the Court was without jurisdiction and the Jury was not authorized to act and thus Marie Flanagan should be discharged from the unauthorized verdict and sentence, since it is void.

Title 18 U.S.C. 2113 defines the various ways in which a bank (or savings and loan association) can have money

taken or attempted to be taken and sets out specific and different punishment for each.

Subsection (a) defines straight robbery by force and violence or by intimidation or attempt thereof, and sets the punishment at a fine not more than $5,000 or more than 20 years, or both.

Subsection (b) defines larceny or theft, both over $100 and under $100 and sets the punishment at not more than a $5,000 fine and not more than 20 years, or both, if over $100, and a fine of not more than $1,000 or not more than one year, or both, if under $100.

Subsection (c) defines receiving from the commission of (b) and sets the punishment at set out in (b).

Subsection (d) provides for an aggravation punishment to those committing (a) or (b) when an assault is present or a life is put in jeopardy by the use of a gun and sets the punishment at a fine not less than $10,000 or not more than 25 years, or both.

Subsection (e) provides for a further aggravation of punishment to those committing (a), (b) and (c) if a killing or kidnapping occurs while in custody or avoiding custody and sets the punishment at not less than 10 years or death if in the jury's verdict.

Subsection (f) and (g) define bank and savings and loan associations.

In summary, there is defined by statute the crime of straight robbery, attempted straight robbery, larceny, and

receiving from larceny, over and under $100. Straight robbery, attempted straight robbery and larceny, when committed, can have aggravated punishment if done by assault or putting the life of someone robbed in jeopardy by the use of a gun. Straight robbery, attempted straight robbery, larceny, both over and under $100 and receiving from larceny when committed can have further aggravated punishment if done in avoiding or attempting to avoid arrest for committing such offense, or freeing or attempting to free himself from arrest or confinement for such offense, kills or kidnaps another.

It is now well settled that 18 U.S.C. 2113, (a), and 18 U.S.C. 2113, (d), define one offense. It is universally recognized that subsection (d) of 18 U.S.C. 2113, which prescribed a greater penalty in a robbery case where an assault is present or where there is a putting of any person's life in jeopardy by the use of a dangerous weapon or device, does not create a separate or distinct offense, but merely provides for an increased punishment of such offender because of the presence of the aggravating circumstances[2] *Holiday v. Johnston*, 313 U.S. 342, 61 St. Ct. 1015. See also *Garnett v. U. S.*, 5th Cir., 1968, 404 F. 2d 26.

It is likewise unanimously held that when one is charged in one count with the offense defined in 18 U.S.C. 2113, (a), and in a subsequent count of violating 18 U.S.C. 2113, (d),

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[2] 18 U.S.C. 2113 (d) provides as follows: *"Whoever, in committing,* or in attempting to commit, *an offense defined in subsection (a)* and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years or both." (Emphasis added.)

only one conviction will stand, for which only one sentence can be imposed. *Heflin v. United States*, 358 U.S. 415, 79 S. Ct. 451. *Prince v. U. S.*, 352 U.S. 322, 77 S. Ct. 403; *Holiday v. Johnston, supra.*

Since 18 U.S.C. 2113, (a), and (d) are but one offense then "(a)" *cannot* be a "necessarily included offense" of "(d)" because an offense cannot be included within itself. The basis of this rationale lies in the fact that only one offense exists as between "(a)" and "(d)" and this proposition is consistent with the holdings of this Court.

A conviction under "(d)" is but a means to increase the punishment for "(a)". A conviction under "(d)" does not create a separate offense from "(a)" because they are but one offense. *Holiday v. Johnston*, supra.

Therefore, Marie Flanagan would show that when the jury returned the verdict of "Not Guilty as charged in the indictment" to the *one count indictment*, since the indictment charged only one offense, that the Court was without jurisdiction and the jury was without authorization to find her guilty of the particular offense of robbery of a bank unaccompanied by an assault, and such verdict and sentence is void.

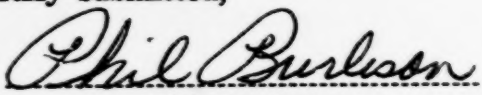
Therefore, since the verdict of the Jury was "Not Guilty as charged in the indictment" and the subsequent attempted and void verdict of guilty to robbery of a bank was unauthorized, the Judge did not have jurisdiction to receive or sentence Marie Flanagan upon said unauthorized and void verdict and Petitioner Marie Flanagan is entitled to be

discharged from the void sentence of robbery of a bank unaccompanied by an assault and that this case be reversed with instructions to enter a verdict and sentence of Not Guilty as charged in the Indictment.

CONCLUSION

WHEREFORE, Petitioner Marie Flanagan prays that upon consideration of this Petition, that this Honorable Court reverse and remand or render with instructions, the verdict and sentence below.

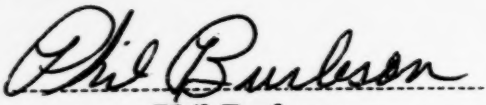
Respectfully submitted,



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(On Appeal Only)

CERTIFICATE OF SERVICE

This is to certify that I have this 12th day of November, 1971, mailed a copy of the above and foregoing Brief on Behalf of Petitioner to Honorable Eldon Mahon, United States Attorney, Northern District of Texas, U.S. Courthouse, Dallas, Texas, postage prepaid, Attorney for Respondent.



Phil Burleson

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Marie FLANAGAN and Jack Wesley Flanagan, Defendants-Appellants.

No. 29624
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

June 23, 1971.

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM:

On September 22, 1969, the Bank of Dallas in Dallas, Texas was robbed by an armed male who was driven from the scene of the crime by a female companion. Subsequently, Jack Wesley Flanagan and his wife, Marie Wells Flanagan, appellants, were arrested, indicted, and tried for violating 18 U.S.C. §§ 2113(a) and (d), and 18 U.S.C. § 2. Jack Flanagan was found guilty as charged. Marie Flanagan was found not guilty as charged in the indictment, but was convicted of the lesser-included offense of robbery unaccompanied by an assault. In this appeal, appellants contend that the trial court erred in failing to order the production of the grand jury testimony; that the evidence is insufficient to support the convictions; that the court erred in admitting into evidence certain in-court identification testimony; and that the court incorrectly included a lesser-included offense instruction in its charge to the jury. We affirm.

Prior to the trial appellants filed a joint motion for production and inspection of the grand jury testimony. Upon being informed by the Attorney for the United States that no transcript of the grand jury proceedings could be pro-

duced because no shorthand notes or any other records had been taken of the testimony, the district judge dismissed appellants' motion. Appellants now assign the failure to supply the non-existent grand jury transcript as error. The same argument was presented to and rejected by this Court in United States v. Harper, 5th Cir. 1970, 432 F. 2d 100. In that matter we stated:

> The decisional law of this Circuit is plainly in harmony with the proposition that a written transcript of grand jury proceedings is not required. It has been specifically held by this court that:
>
> > There is no constitutional requirement that grand jury proceedings be transcribed. The failure to transcribe does not warrant the dismissal of the indictment. Dennis v. United States does not change this rule. (Citations omitted)
>
> Since there is no constitutional requirement that a transcript of a grand jury proceeding be made, obviously the failure to produce such non-required records when they do not exist cannot be error. * * * 432 F. 2d at 102.

Secondly, appellants argue that there is insufficient evidence to support their convictions. It is, of course, a well settled rule that a conviction must be sustained if, taking the view most favorable to the government, there is substantial evidence to support it. Glasser v. United States, 315 U.S. 60, 80, 62 S. Ct. 457, 469, 86 L. Ed. 680 (1942). After reviewing the record in light of this standard, we have concluded that appellants' argument is without merit.

Appellants also assert that the trial court erroneously admitted into evidence certain in-court identification testimony and incorrectly included a lesser-included offense instruction in its charge to the jury. Since appellants failed to object to this action of the trial court and raise the questions for the first time on appeal, they find themselves in the predicament of demonstrating that the action was so palpably flagrant as to affect their substantial rights and constitute

plain error under Fed.R.Crim.P. 52(b). United States v. Toler, 5th Cir. 1971, 440 F. 2d 1242. The plain error rule is invoked only in exceptional circumstances to avoid a clear miscarriage of justice. Eaton v. United States, 5th Cir. 1968, 398 F. 2d 485, 486, cert. denied, 393 U.S. 937, 89 S. Ct. 299, 21 L. Ed. 2d 273 (1968); Mims v. United States, 5th Cir. 1967, 375 F. 2d 135, 147, or where the fairness or integrity of the judicial proceedings is seriously affected, United States v. Atkinson, 297 U.S. 157, 56 S. Ct. 391, 80 L. Ed. 555 (1936). United States v. Nolte, 5th Cir. 1971, 440 F. 2d 1124. We are not persuaded, after a careful analysis of the record, that the action here challenged constitutes plain error.

For the above reasons the judgment of the district court is affirmed.

Affirmed.

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No. 71-663

In the Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
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MARIE WELLS FLANAGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
KENNETH R. PETERSEN,
Acting Assistant Attorney General,
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Attorneys,
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MARIE WELLS FLANAGAN, PETITIONER

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-3) is reported at 445 F. 2d 263.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1971. A petition for rehearing was denied on September 16, 1971. Mr. Chief Justice Berger extended the time for filing a petition for a writ of certiorari to November 15, 1971, and on November 13, 1971, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence identifying petitioner as a participant in the crime to support the verdict.

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2. Whether certain pretrial identification procedures were proper.

3. Whether petitioner, who aided and abetted an armed robbery, could be found guilty of the unaggravated form of the offense.

STATEMENT

Petitioner and her husband, Jack Wesley Flanagan, were jointly indicted in a single count for aggravated robbery of a federally insured bank in violation of 18 U.S.C. 2113 (a) and (d).[1] After a joint jury trial in the United States District Court for the Northern District of Texas, Jack Flanagan was convicted as charged and sentenced to twenty-five years' imprisonment. Petitioner was convicted of bank robbery by force in violation of 18 U.S.C. 2113(a), but was not found guilty of the aggravated form of the offense under 18 U.S.C. 2113(d) (Tr. 695–696; see also Vol. I, pp. 19–20). She was sentenced to imprisonment for ten years. The court of appeals affirmed both convictions *per curiam*. (Pet. App. A–1 to A–3.)

The evidence adduced at trial showed that Samuel Smith, a bank porter of the Bank of Dallas, accompanied by Lillie Mae Doyal, a teller, was walking across the bank's parking lot carrying two boxes of money from the tellers' drive-in cages to the main bank building when a 1966 Chevrolet pulled into the parking lot and stopped six to eight feet in front of the two bank employees (Tr. 44, 47, 57, 119). A man

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[1] The indictment is found in Volume I, page 1, of the three volume record which we are lodging with the Clerk of this Court. "Tr." refers to the trial transcript, which is found in Volumes II and III of the record.

in the car pointed a gun at Smith and ordered him to drop the boxes (Tr. 48–49). The man loaded the boxes into the car and the car pulled away (Tr. 49–50).

Jack Flanagan was positively identified as the armed robber by Smith and Mrs. Doyal (Tr. 78, 106, 111–112). Mrs. Doyal identified petitioner as the driver (Tr. 113). Her view of the driver through the car window was unobstructed (Tr. 100). Although the driver was wearing sunglasses and a head scarf, Mrs. Doyal noticed a strand of blond hair protruding from the scarf (Tr. 104). At one point the driver, who had been looking in the rear-view mirror, turned sideways and Mrs. Doyal had a direct view of her nose and face, which Mrs. Doyal described as a "baby doll face, a small face" (Tr. 103, 105). About two weeks after the robbery, Mrs. Doyal identified petitioner from a series of photographs shown to her by an F.B.I. agent (Tr. 139). Later, on November 17, 1969, when petitioner and Jack Flanagan made a deposit at Mrs. Doyal's drive-in window, Mrs. Doyal recognized them immediately as the robbers (Tr. 109–113).

ARGUMENT

1. The jury could properly credit Mrs. Doyal's positive identification of petitioner; there was thus sufficient evidence identifying petitioner as a participant in the crime. There was no showing that the procedures employed by the F.B.I. agent in showing Mrs. Doyal the series of photographs after the crime were improperly suggestive. No one had talked about petitioner to Mrs. Doyal nor did anyone suggest to

her which photograph to select (Tr. 131, 139). Defense counsel at trial made no objection to the use of photographs to identify petitioner.

2. Petitioner contends that the evidence against her was insufficient and her conviction under 18 U.S.C. 2113(a) void as a matter of law since, if she aided and abetted the robbery at all, she aided and abetted the aggravated form of the offense defined in Section 2113(d). Since Jack Flanagan did carry a gun, petitioner could have been convicted of the aggravated form of the offense. See 18 U.S.C. 2. Section 2113(d) does not create a separate offense, but merely provides for additional punishment when, in the commission of an offense under Section 2113(a), life is put in jeopardy by the use of a deadly weapon. See *Holiday* v. *Johnson,* 313 U.S. 342, 349. The jury, in the exercise of its power of lenity, could decide that petitioner should not be held responsible for the gun she did not carry. At most the verdict is inconsistent, a factor which does not invalidate it. See *Dunn* v. *United States,* 284 U.S. 390.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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HENRY E. PETERSEN,
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BEATRICE ROSENBERG,
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DECEMBER 1971.

U.S. GOVERNMENT PRINTING OFFICE 1971